Supreme Court, U.S.
FILED
JUL 30 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1978

NO. 78-1854

LENNIE B. WARREN and EVERETT R. WARREN,
Appellants,

VERSUS

SUN OIL COMPANY (Delaware), a corporation,
Appellee

ON APPEAL FROM THE SUPREME COURT OF OKLAHOMA

MOTION TO DISMISS

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July, 1979

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ON APPEAL FROM THE SUPREME COURT OF OKLAHOMA

MOTION TO DISMISS

COMES NOW the Appellee, SUN OIL COMPANY (Delaware), a corporation the duly appointed and acting operator of the Hawley West Unit, and moves the Court to dismiss the present appeal for the following reasons:

A. The appeal is not within the jurisdiction of the United States Supreme Court because it was not taken in conformance with the statues and rules governing such appeals.

B. The question sought to be reviewed by the Appellants was not timely or properly raised or expressly passed on by the Courts of the State of Oklahoma.

STATEMENT OF FACTS

On December 12, 1973, Sun Oil Company, (Delaware), filed an application before the Oklahoma Corporation Commission (hereinafter COMMISSION) for the creation of a unit for the secondary recovery of oil and gas under the Oklahoma Unitized Management of Common Sources of Supply Act (hereinafter referred to as ACT) as set forth in 52 OS 1971, §287.1 through §287.15. The Appellants, as owners of property within the proposed tract, were given notice of the pending application and the hearing scheduled for January 8, 1974. Appellants were represented by counsel at that hearing. On Janury 16, 1974, the COMMISSION approved the application and Unitization Plan and ordered the creation of the Hawley West Unit (hereinafter referred to as UNIT). A copy of the Report, Findings, and Order of the COMMISSION is set forth in the Appendix. Appellants did not appeal that Order.

In July, 1976, the Appellee, as operator of the UNIT, attempted to use a non-producing well located on Appellants' property in furtherance of the UNIT purpose. Appellants refused to permit the UNIT access to the well and Appellee commenced an action in the District Court of Grant County, Oklahoma, requesting injunctive relief from further interference by the Appellants. That case was styled Sun Oil Company (Delaware), a corporation, Plantiff vs. Lennie B. Warren and Everett R. Warren, Defendants, Case No. C-76-30. Judgment granting Appellees a permanent injunction against Appellants was entered in May, 1977. The granting of the injunction was affirmed by the Oklahoma Court of Appeals, Division Two, on August 1, 1978. Subsequent thereto, Appellants retained new counsel. On August 28, 1978, they filed an application for re-hearing before the Oklahoma Court of Appeals, Division Two, wherein they alleged for the first time that certain provisions of the ACT violated the Fourteenth Amendment of the Constitution of the United States. This application for re-hearing and a later Petition for Certiorari to

the Oklahoma Supreme Court were denied without comment by either court.

AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

Appellants request relief by this Court on the claim that 51 OS 1971, §287.5 and §287.13 violate the Fourteenth Amendment of the Constitution of the United States and allege that this appeal is permitted under 28 USC §1257(2). However, the opening paragraph of 28 USC §1257 reads as follows:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:. . .

The order creating the UNIT is not a decision of the highest court of the State of Oklahoma. The right to appeal orders of the COMMISSION to the Oklahoma Supreme Court is specifically provided by the ACT (see 51 OS 1971, §287.6). Even though Appellants were represented by counsel at the proceedings before the COMMISSION on January 8, 1974, no appeal was taken from the order creating the UNIT. Therefore, the order creating the UNIT, which included the Appeallants' property is not an order within the scope of §1257(2).

In addition, 28 USC §2101(c) provides:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety (90) days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty (60) days.

More than five (5) years have passed since the creation of the UNIT. Appellants now challenge the inclusion of their property within the UNIT area by this claim of a constitutional defect. The order which

subjected their property to the UNIT operations was made on January 16, 1974, not February 15, 1979 as claimed by the Appellants. Jurisdiction of the court to review the order creating the UNIT ceased February 15, 1974 - thirty (30) days after creation of the UNIT without an appeal being perfected to the Supreme Court of Oklahoma.

Appellants state (pg. 5) that the Oklahoma Court of Appeals, Division Two, and the Oklahoma Supreme Court considered and expressly rejected the federal constitutional claim. Appellee has stated previously that the first claim of a constitutional defect was raised in Appellants' petition for re-hearing before the Oklahoma Court of Appeals, Division Two. No such question was raised before the trial court or in the initial appeal. The Oklahoma Court of Appeals, Division Two, denied the petition for re-hearing without comment and the Oklahoma Supreme Court denied to grant certiorari to the decision of that court, also without comment. Therefore, no reference to or comment was made by either court to the constitutional question. Under Oklahoma appellate procedure, the Supreme Court may not consider constitutional questions raised for the first time in briefs on appeal to that court. Pelican Production Corp. vs. Mize, 573 P. 2s, 703 (OKLA. 1977). See also Birmingham Fire Insurance Company vs. Bond, 301 P. 2d, 361 (OKLA. 1956).

As a final basis for this Motion to Dismiss the Appellee would point out that the constitutionality of the ACT is not a new quesiton before this Court. The ACT has previously been held not to violate the provisions of due process or taking of private property for public use of the Fourteenth Amendment of the Constitution of the United States. Jones Oil Company vs. Corporation Commission of Oklahoma, 382 P. 2d, 751 (OKLA. 1963), ceriorari denied 375 U.S. 931, 84 S. CT. 332, 11 L. Ed. 2d 263. In Cities Service Gas Company vs. Peerless, 340 US 179 (1950) the following statement by the court is found at page 185:

> The due process and equity protection isues raised by Appellant are virtually without substance. It is now undeniable that a state may adopt reasonable regulations to prevent economic and physical waste of natural gas. This court has upheld numerous kinds of state legislation designed to curb the waste of natural resources and to protect the correlative rights of owners through ratable taking. . .

Appellants' final argument (pg. 10) that the ultimate in the conservation of oil and gas is not to produce it at all totally ignores the correlative rights of others and the purpose for which the ACT was adopted.

CONCLUSION

Appellees believe that the facts stated herein show that the Appellants have totally failed to present any claim over which this court has jurisdiction to consider further and therefore prays that the appeal be dismissed.

Respectfully submitted,

MITCHELL, DeCLERCK, COX,
HALSTEAD, LAHMAN & SHAW
By: EDWARD A. DeCLERCK
P.O. Box 1029
Enid, OK 73701
COUNSEL FOR APPELLEE

APPENDIX

BEFORE THE COPORATION COMMISSION OF THE STATE OF OKLAHOMA

APPLICANT: SUN OIL COMPANY (DELAWARE)

FOR AN ORDER CREATING THE HAWLEY WEST UNIT, HAVING FOR ITS PURPSOE THE UNITIZED MANAGEMENT, OPERATION AND FURTHER DEVELOPMENT OF THE MISSISSIPP CHAT, THE COMMON SOURCE OF SUPPLY UNDERLYING ALL OR PORTIONS OF VARIOUS SECTIONS IN TOWNSHIP 27 NORTH, RANGE 8 WEST and TOWNSHIP 26 NORTH, RANGE 8 WEST, GRANT COUNTY, OKLAHOMA	CAUSE CD NO. 38022 ORDER NO. 102582

REPORT OF THE COMMISSION

This cause came on for hearing before Harvey H. Cody, Trial Examiner for the Corporation Commission of the State of Oklahoma, in the Commission's Court Room, Jim Thorpe Building, Oklahoma City, Oklahoma, on the 8th day of January, 1974, at 9:00 a.m., by order of the Commission referring and setting the cause for hearing.

Appearances: George B. Spencer, Attorney, appeared for the Applicant, Sun Oil Company; T.F. Dukes, Attorney, appeared as attorney for Lennie Warren and her husband Everett R. Warren; and Harvey H. Cody, Conservation Attorney, appeared for the Commission.

The Trial Examiner proceeded to hear the cause andhas filed his report recommending that the applicant be granted, which report and recommendation is hereby adopted and the Commission therefore finds as follows:

FINDINGS

1. That this is the application of Sun Oil Company (Delaware) for an order creating the Hawley West Unit, having for its purpose the unitized management, operation and further development of the Mississippi Chat, the common source of supply underlying all or

portions of various sections in Township 27 North, Range 8 West and Township 26 North, Range 8 West, Grant County, Oklahoma.

2. A. That notice of the filing of the application herein and of the time, place and purpose of the hearing was regularly given in all respects as required by law, and the Commission has jurisdiction of the subject matter and of the persons interested therein and has jurisdiction to enter the order hereinafter set forth, and no protests have been filed; and the Commission finds that all of the material allegations of the application filed herein are true and are supported by susbstantial evidence.

B.That an amendment (dated 10-1-73) to the Plan of Unitization for the Hawley West Unit was entered into the record of the hearing of this matter as an addition of Article 30, Sections 30.1 and 30.2 to said Plan.

C. That during the course of the hearing of this matter the legal description as set forth in the application and the notice of filings for the proposed unit area was corrected to conform with the Plan of Unitization.

3. That the Unit Area, conforming with the Plan of Unitization, which applicant desires to unitize consists of the following:

Township 27 North, Range 8 West, Grant County, Oklahoma:

Section 21: All
Section 28: All
Section 29: SE¼
Section 31: S½ and NE¼
Section 32: All
Section 33: All
Section 34: All

Township 26 North, Range 8 West, Grant County, Oklahoma:

Section 2: All, **Except:** A cemetery Tract described as beginning at a point 825' West of the NE corner of NE¼ Section 2, thence South 594', then West 495', thence North 594', thence East 495' to the point of beginning; and

EXCEPT: A Tract described as beginning at the SE corner of the SE¼ Section 2, thence due West 150', thence due North 280', thenc e due East 150', thence due South 280' to the point of beginning.

Section 3: All
Section 4: All
Section 5: N½ and SE¼
Section 9: N½
Section 10: N½
Section 11: N½

Plat attached.

that said lands are delineated upon a plat which is attached to the

Plan of Unitization as Exhibit "B", and which said lands are hereinafter referred to as Unit Area. The plat of the area referred to above is adopted and made a part hereof by reference.

4. A The Commission finds that the Unit Area hereinabove described is underlain by and constitutes a common source of supply of oil and gas known as the Mississippi Chat encountered between the depths of 5,262' and 5,316', as found on the electric log for the Champlin Exploration Inc.'s Hickock #1 Well located in the SE¼ SE¼ Section 3-26N-8W, Grant County, Oklahoma, and that said common source of supply of oil and gas known as the Mississipii Chat encountered between the depths of 5,262' and 5,316', as found on the electric log for the Champlin Exploration Inc.'s Hickock #1 Well located in the SE¼ SE¼ Section 3-26N-8W, Grant County, Oklahoma, and that said common source of supply has been defined and determined to be productive of oil and gas by actual drilling operations.

B. That the source of water supply will be the Layton Sand found the approximate depth of 4,600'.

5. That the unitized management, operation and further development of said common source of supply is reasonably necessary in order to effectively carry on pressure maintenance or repressuring operations, cycling operations, waterflooding operations, or any combination thereof, or any other form of joint effort calculated to substantially increase the ultimate recovery of oil and gas from said common source of supply; that one or more of said utilized methods of operations as applied to such common source of supply or portions thereof are feasible, will prevent waste and will with reasonable probability result in the increased recovery of substantially more oil and gas from said common source of supply than would otherwise be recovered; and that the estimate additional cost of conducting such operations will not exceed the value of the additional oil and gas so recovered.

6. That this proposed unit and the adoption of one or more of such unitized methods of operation is for the common good and will result in the general advantage of the owners of the oil and gas rights within the common source of supply or portion thereof directly affected.

7. That the size and shape of the Unit Area is such as may be reasonably required by the successful and efficient conduct of the unitized method or methods of operation for which the unit is

created, and that such unit and the conduct of unitized operations thereunder will have no material adverse effect upon the remainder of such common source of supply.

8. That the Plan of Unitization, as amended, and as filed herein and presented to the Commission for approval, and which is made a part hereof by reference thereto, is suited to the needs and requirements of the particular unit designed in said plan as the Hawley West Unit; that the terms and provisions of said Plan of Unitization are adequate and are proper to effectuate and accomplish the purposes of the Statues hereinbelow referred to; that said plan contains fair, reasonable and equitable provisions for: (A) The efficient unitized management and control of the further development and operation of the Unit Area for the recovery of oil and gas from the common source of supply affected;(B)The division of interest or formuia for the apportionment and allocation of the unit production among and to the several separately owned tracts within the Unit Area such as will reasonably permit persons otherwise entitled to share in or benefit by the production from such separately owned tracts to produce or, receive in lieu thereof their fair, equitable and reasonable share of the unit production and other benefits thereof; (C) The manner in which the Unit and the further development and operation of the Unit Area shall or may be financed and the basis, terms and conditions on which the cost and expense thereof shall be apportioned among and assessed against the tracts and interests made chargeable therewith, including a detailed accounting procedure governing all charges and credits incident to such operations; (D) The procedure and basis upon which wells, equipment and other properties of the several lessees within the Unit Area are to be taken over and used for unit operations, including the method of arriving at the compensation therefor or of otherwise proportionately equalizing or adjusting the investment of the several lessees in the project as of the effective date of Unit Operations; (E) The creation of an operating committee to have general overall management and control of the Unit and the conduct of its business and affairs and the operations carried on by it, together with the creation or designation of such other subcommittees, boards or officers to function under authority of the operating committee, as may be necessary, proper and convenient in the efficient management of the Unit, defining the powers and duties of all such committees, board or officers, and prescribing their tenure and time and method for their selection; (F) The time when the Plan of Unitization shall become and be effective: (G) The time when the

conditions under which and the method by which the Unit shall or may be dissolved and its affairs wound up.

9. That the application herein and the Plan of Unitization, both as amended, presented for approval conform to and comply with the requirements of Sections 287.1-287.15, both inclusive, Title 52 O.S. 1971, and that said Plan of Unitization has been signed, ratified and approved in writing by lessees of record owning 92% of the Unit Area affected thereby and by owners of record of 78% (exclusive of royalty interest owned by lessees or by subsidiaires of any lessee) of the normal 1/8 royalty interst in and to the Unit Area and the order of the Commission entered in this cause may become effective immediately and the Plan of Unitization shall become effective at the time as provided for in said Plan of Unitization.

10. That Sun Oil Company (Delaware), P.O. Box 2039, Tulsa, Oklahoma 74102, will be the Operator of the Hawley West Unit, as set out herein.

ORDER

IT IS THEREFORE ORDERED by the Corporation Commission of the State of Oklahoma, as follows:

1. That the Hawley West Unit is hereby created in accordance with the terms, provisions and conditions of the Plan of Unitization as amended, attached to the application, as amended, on file herein.

2. That the Plan of Unitization, as amended, attached to the application, as amended, herein is made a part of this order by reference thereto and is hereby approved; and such Plan of Unitization shall constitute the Plan of Unitization in and for the said Hawley West Unit and the unitized area of said Unit, all to the same extent and with the same force and effect as if copied herein in its entirety.

3. That the Unit Area consists of the Mississippi Chat, common source of supply, shown by the plat attached to the Plan of Unitization as Exhibit "B", and covers and includes the following described land:

Township 27 North, Range 8 West, Grant County, Oklahoma:

Section 21: All
Section 28: All
Section 29: SE¼
Section 31: S½ and NE¼
Section 32: All
Section 33: All
Section 34: All

Township 26 North, Range 8 West, Grant County, Oklahoma:

Section 2: All, **EXCEPT:** A cemetery Tract, described as beginning at a point 825' West of the NE corner of NE¼ Section 2, thence South 594', thence West 495', thence North 594', thence Est 495' to the point of beginning; and

EXCEPT: A tract described as beginning at the SE corner of the SE¼ Section 2, thence due West 150', thence due North 280', thence due East 150', thence due South 280' to the point of beginning.

Section 3: All
Section 4: All
Section 5: N½ and SE¼
Section 9: N½
Section 10: N½
Section 11: N½

4. That the source of water supply will be the Layton Sand found at the approximate depth of 4,600'.

5. That each of the tracts of land located in the Unit Area shall become subject to the terms and provisions of the Plan of Unitization, as amended, and hereby approved and a participant in the Unit production and in the other benefits and burdens of the Unit in accordance with the Tract Participation Percentage set forth in Exhibit "A" in said Plan of Unitization.

6. It is further ordered that this secondary recovery operation shall be operated and the production therefrom calculated in accordance with Rule No. 2-260 of Order No. 83168, as amended by Order Nos. 87829 and 94418, and that said secondary recovery operation shall be operated in such a manner that no damage will be done to the surface or any other oil, gas, or fresh water bearing formation.

7. That the unit and the unit operator shall, from time to time, make such reports to the Commission concerning the operation of the Unit Area, as may be requested by the Commission.

8. That the Commission retains continuing jurisdiction over said Unit for the purpose of amending, modifying and interpreting the terms and provisions of this order and the Plan of Unitization of said Unit.

9. That Sun Oil Company (Delaware), P.O. Box 2039, Tulsa, Oklahoma 74102, will be the operator of the Hawley West Unit.

10. That this order shall become effective immediately and the Plan of Unitization shall become effective at the time provided for in said Plan of Unitization.

DONE AND PERFORMED this 16 day of January, 1974.

CORPORATION COMMISSION OF OKLAHOMA

Charles Nesbitt, Chairman

Rex Privett, Commissioner

Attest:

Ed Overholse: